Office-Supreme Court, U.S.
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81-40

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES
(October Term 1981)

CYNTHIA PROCTOR,

Petitioner,

vs.

PAUL KRAMER, M.D.,

Respondent.

- - - - - - - - - - - - -

WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

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PETITION FOR CERTIORARI

A. QUESTIONS PRESENTED FOR REVIEW.

On January 24, 1975, the petitioner suffered serious bodily injury from the alleged medical malpractice of the respondent. The statute of limitation for bringing such an action was two (2) years. Section 95.11(4)(b), Florida Statutes (1975). At the time the action accrued Florida had a special, statutory procedure for screening medical malpractice claims. Section 768.40 et seq., Florida Statutes (1975). It is interesting to note that during the pendency of this action the Florida Supreme Court, in Aldana v. Holub, 381 So. 2d 231 (Fla. 1980), ruled that statute unconstitutional as a violation of a claimant's due process rights. Under this statutory procedure, when an applicable action was commenced, the mediation panel took jurisdiction of the claim. While the action was in the jurisdiction of the mediation panel the two (2) year statute of limitation period was tolled for 120 days, unless extended by order of the

judicial referee. Upon an order, jurisdiction could be extended to six (6) months, but in no event could it be extended past ten (10) months. Section 768.44(3), (4), Florida Statutes (1975).

The petitioner filed her claim with the mediation panel on June 24, 1976, thereby tolling the statute of limitation with seven (7) months remaining. No "mediation" hearing on the petitioner's claim was held within the 120 day period; however, the respondent filed a timely request to extend the jurisdiction of the panel on August 10, 1976, within the 120 day period. An Agreed Order extending the panel's jurisdiction was entered on November 16, 1976. This, order was entered after the 120 day period had expired. (A. 1).

The Circuit Court of the Seventeenth Judicial Circuit in and for Broward County, Florida ruled that because the Agreed Order was not entered until after the 120-day period, jurisdiction of the mediation panel was not extended and therefore terminated on October 24, 1976, thus causing the statute of limitation to start running again on that date. Accordingly,

the court ruled the limitation period ended on May 24, 1977, and granted a summary final judgment for the respondent since the petitioner's claim was not filed in the circuit court until June 21, 1977. (A. 3).

Had the court ruled the Agreed Order, which was never questioned by the parties in the mediation proceedings, was valid, the mediation jurisdiction and tolling of the statute of limitation would have continued for at least six (6) months, until December 24, 1976, causing the statute of limitation period to expire on July 24, 1977. Thus, the petitioner's claim would have been timely filed and the suit would not have been dismissed.

The most pertinent facts giving rise to this petition involve Florida's appeal procedure. In the case sub judice this procedure effectively denied the petitioner her due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution.

When the summary final judgment was entered, the petitioner appealed to the Fourth

District Court of Appeal of Florida. That court, in a per curiam decision with one dissent, affirmed the circuit court. Proctor v. Kramer, 394 So. 2d 121 (Fla. 4th D.C.A. 1980) (rehearing denied March 3, 1981). This holding, as indicated by the dissent, was in direct conflict with the decision of Limond vs. Llanio, 349 So. 2d 214 (Fla. 3d DCA, 1977). Had Limond been followed, the court would have reversed the summary final judgment. When the case was in the appellate process this party could have expected supreme court review in the event the Fourth District Court of Appeal of Florida ruled contrary to Limond.

After petitioner's motion for a rehearing was denied on March 3, 1981, she filed an appeal to the Florida Supreme Court. A recently enacted provision of the Florida Constitution, Article V, Section 3(b)(3), provided a basis for invoking that court's jurisdiction. The provision states the Florida Supreme Court may review a decision of a district court of appeal "that expressly and directly conflicts . . . with a decision of

another district court of appeal or of the supreme court on the same question of law." Florida Constitution, Article V, Section 3(b)(3). Prior to the effective date of this provision, (April 1, 1980), the Florida Constitution allowed the Florida Supreme Court to review by certiorari conflicting decisions between or among the several state district courts of appeal, irrespective of whether the conflict was apparent in the face of the district court decision, or whether it was necessary to review the trial court proceedings to establish the conflict. The purpose was not to have inconsistent laws effective within different districts of the same state.

Prior to the appeal to the Florida Supreme Court in the case sub judice, the supreme court in Jenkins v. State, 387 So. 2d 1356 (Fla. 1980), interpreted the terms "expressly and directly" to require a written majority opinion expressing the conflict. The fact that a conflict between the districts was "express" in a dissenting or concurring opinion was deemed not to establish a conflict. Since the

conflict in the instant case was "express" only in the dissenting opinion, the Florida Supreme Court summarily held it was without jurisdiction to resolve the conflict.

Such a refusal to resolve conflicts between the districts is arbitrary and capricious and, therefore, a denial of the petitioner's due process and equal protection rights.

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D. OPINIONS DELIVERED IN COURTS BELOW

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394 So. 2d 121 (Fla. 4th DCA 1980)
(rehearing denied March 3, 1981)

Proctor v. Kramer,
Case No. 60,450, filed April 8, 1981
(Fla. 1981).

E. JURISDICTIONAL GROUNDS. The judgment sought to be reviewed is the Florida Supreme Court's dismissal of the petitioner's appeal on April 8, 1981. This Court has jurisdiction under 28 U.S.C. 1257(3). The petitioner has been denied her due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution.

F. CONSTITUTIONAL PROVISIONS AND STATUTES.

§3. Supreme court

(b) Jurisdiction.--The supreme court:

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

95.11 Limitations other than for the recovery of real property.--Actions other than for recovery of real property shall be commenced as follows:

(4) WITHIN TWO YEARS. --

(b) An action for medical malpractice shall be commenced within 2 years from the time the incident giving rise to the action occurred or within 2 years from the time the incident is

discovered, or should have been discovered with the exercise of due diligence; however, in no event shall the action be commenced later than 4 years from the date of the incident or occurrence out of which the cause of action accrued.

768.44 Medical liability mediation panels; membership; hearings.

(3) The clerk shall, with the advice and cooperation of the parties and their counsel, fix a date, time, and place for a hearing on the claim before the hearing panel. The hearing shall be held within 120 days of the date the claim was filed with the clerk unless, for good cause shown upon order of the judicial referee, such time is extended. Such extension shall not exceed 6 months from the date the claim is filed. If no hearing on the merits is held within 10 months of the date the claim is filed, the jurisdiction of the mediation panel on the subject matter shall terminate, and the parties may proceed in accordance with law.

(4) The filing of the claim shall toll any applicable statute of limitations, and such statute of limitations shall remain tolled until the hearing panel issues its written decision or the jurisdiction of the panel is otherwise terminated. In any event, a party shall have 60 days from the date the decision of the hearing panel is mailed to the parties or the date on which the jurisdiction of the panel is otherwise terminated in which to file a complaint in circuit court.

G. STATEMENT OF CASE. The petitioner's action for medical malpractice accrued on January 24, 1975. Pursuant to Section 768.40 et seq., Florida Statutes (1975), the petitioner filed her mediation claim on June 24, 1976. On November 15, 1976 an Agreed Order extending jurisdiction of the panel was entered by the Circuit Court of the Seventeenth Judicial Circuit of Florida. (A. 1). No mediation hearing was held.

On June 21, 1977 the petitioner filed her action in circuit court. The court, on May 16, 1979 entered a summary, final judgment against the petitioner dismissing her claim holding that it was not timely filed. (A. 3).

The Summary Final Judgment was affirmed per curiam on May 7, 1980 by the Fourth District Court of Appeal of Florida, with a dissenting opinion. (A. 7). Petitioner moved for a rehearing on May 21, 1980. This motion was denied on March 3, 1981.

The petitioner then appealed to the Florida Supreme Court. On April 8, 1981 the supreme court dismissed petitioner's petition

for review, holding the court was without jurisdiction to decide the cause.

The federal questions concerning the petitioner's due process and equal protection rights were first raised in the petitioner's brief on jurisdiction to the Florida Supreme Court. The arguments, however, were disposed of summarily. This instance is the first opportunity petitioner has had to fully raise these constitutional questions.

H. ARGUMENT.

The Florida Constitution, Article V, Section 3(b)(3) as interpreted by Jenkins v. State, 349 So. 2d 215 (Fla. 1980), violates the petitioner's equal protection and due process rights.

A general rule of constitutional law is that appellate review is not required under due process on the condition a full, fair trial on the merits is provided. Lindsey v. Normet, 405 U.S. 56, 77, 31 L. Ed. 2d 52, 92 S. Ct. 862 (1972); Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585. See, Ohio ex Rel. Bryant, 281 U.S. 74, 74 L. Ed. 710, 50 S. Ct. 228 (1930). The petitioner never received a full, fair trial on the merits. She was first denied the right to a trial by having to submit her claim to the mediation panel. The statute requiring this was ruled unconstitutional as a denial of a claimant's due process rights. See Aldana v. Holub, 381 So. 2d 231 (Fla. 1980). If the petitioner had not been required to go through mediation, as is now the case, she would have timely filed her complaint as she

would have filed it directly in the circuit court rather than with the mediation panel.

When the action was in mediation the respondent timely filed a motion to extend the panel's jurisdiction. However, no hearing on respondent's motion for extension was held within the 120 day period; instead, an "Agreed Order" was entered after that time. At the time this occurred, neither the mediation statute nor any judicial opinions determined that the 120 day period was a jurisdictional deadline. The petitioner filed her common-law action in circuit court on June 21, 1977 which would have been timely if, as she believed, jurisdiction of the mediation panel had been extended. However, as held by the trial court and affirmed by the Fourth District Court of Appeal of Florida, mediation jurisdiction ended after 120 days. Thereby, petitioner, through no fault, was deprived access to a trial.

Assuming the petitioner was not deprived of a full, fair trial on the merits, this Court has held that when an appeal is afforded it cannot be granted to some litigants

and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. Lindsey v. Normet, 405 U.S. 56, 77 (1972). In Lindsey a tenant was required to post a double bond as a requisite to appeal. The Court held this requirement did not relate to the damage allegedly suffered by the landlord, thereby holding the requirement was arbitrary and a denial of the tenant's equal protection rights.

In the case sub judice the requirement of a written majority opinion before a case is granted the full scope of the state's appellate review is likewise arbitrary. The effect of the interpretation of the Florida Constitution is to allow some claimants the opportunity of requesting the Florida Supreme Court to resolve a conflict to their benefit while others would not, merely because a district court of appeal does or does not write a majority opinion. Such a procedure constitutes an arbitrary denial of the final level of the State appeal procedure, and allows a district court of appeal to establish, by

silence, a separate body of law within that district, not subject to review by the highest court in the state. In effect, it allows an intermediate level appellate court to determine the Florida Supreme Court's jurisdiction.

The arbitrary manner of granting or denying access to Florida's last level of appellate review is evidenced by the method of disposing of those appeals where no majority opinion is written. The Court summarily denies jurisdiction without considering the briefs on jurisdiction which would, arguably, set out the requisite conflict in a short, concise manner.

The reason delineated for this arbitrary and summary disposal of appeals from per curiam decisions is that the Florida Supreme Court would become overburdened if all such appeals required consideration. See, Jenkins v. State, supra; England, Constitutional Jurisdiction of the Supreme Court of Florida: 1980 Reform, 32 U. Fla. L. Rev. 147, 176 (1980). While the burden upon the Court may be greater by allowing the appeal of per curiam decisions, the potential harm to claimants resulting from

the denial of that right to appeal a district court's decision, especially where other claimants have such a right in cases differing only in that a written majority opinion is authored, outweighs any advantage of reducing the supreme court's caseload. Can the Florida Supreme Court be more overburdened than this Court?

There is little doubt the guarantee of equal protection in the Fourteenth Amendment intended that all persons should have like access to the courts of the country. Barbier v. Connolly, 113 U.S. 27, 28 L. Ed. 923, 5 S. Ct. 357 (1885). This statement can not mean that equal protection is given only in respect to access to courts of first instance, and not to courts of appeal. See, Griffin v. Illinois, 351 U.S. 12, 100 L. Ed. 891, 76 S. Ct. 585 (1956). The interpretation of the Florida Constitution by Jenkins places the petitioner in a position of being denied a right to an appeal to which others, in similar cases, would have been entitled. It is a rule of constitutional law that a party otherwise entitled to an appeal who, by the construction of a statute

is prevented from doing so, where such right is given to all others in similar cases, is deprived of due process. See, 16A Am. Jur 2d, Constitutional Law §859. In other words, due process should condemn the arbitrary withholding of the right of appeal when it is permitted to others in similar situations.

Had the Fourth District Court of Appeal of Florida written a majority opinion pointing out the conflict, the petitioner would have been able to appeal the decision, thus allowing the Florida Supreme Court to resolve the conflict among the districts. The petitioner's right to appeal was, therefore, cut off at the District Court level rather than the Supreme Court level merely because the District Court issued a per curiam decision. An identical case, in which a written opinion was rendered, would have conferred certiorari jurisdiction; and, even without a written opinion, review would have been available under prior Florida Law.

This procedure violates the petitioner's equal protection and due process rights. Petitioner, therefore, requests that a Writ of

Certiorari issue to the Supreme Court of The State of Florida.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Certiorari has been furnished, by United States Mail, to K. SCOTT DWYER, ESQUIRE, of Preddy, Kutner & Hardy, P.A., 12th Floor, Concord Building, 16 West Flagler Street, Miami, Florida 33130; and JIM SMITH, ESQUIRE, Attorney General of Florida, The Capitol, Tallahassee, Florida 32301, this 6th day of July, 1981.

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CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES
(October Term 1981)

CYNTHIA PROCTOR,

Petitioner,

vs.

PAUL KRAMER, M.D.,

Respondent.

- - - - - - - - - - - - -

APPENDIX

GARY L. WILKINS and LEO WOTITZKY
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IN THE CIRCUIT COURT OF THE 17TH JUDICIAL CIRCUIT IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO. MM 76/60 Reasbeck

CYNTHIA PROCTOR,

Claimant,

vs.

PAUL KRAMER, M.D.,

Respondent.

_____/

AGREED ORDER GRANTING EXTENSION OF TIME FOR FINAL HEARING

THIS CAUSE having come on to be heard on the defendant's request for extension of time for the holding of the final hearing in the above styled cause, and counsel for all parties being in agreement and the Court, being fully advised in the premises, it is hereby:

ORDERED AND ADJUDGED that the defendant's request, be and the same, is hereby GRANTED, and the final hearing in this matter shall be conducted within ten (10) months from the date of the filing of the lawsuit.

DONE AND ORDERED in Chambers in Broward

County, Ft. Lauderdale, Florida, this 15th day of November, 1976.

/s/ JAMES M. REASBECK
CIRCUIT COURT JUDGE

Copies furnished to:
Brumer, Moss, Cohen, et al
Stephens & Schwartz, P.A.

IN THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT IN AND FOR BROWARD
COUNTY, FLORIDA

CASE NO. 77-9907 (Bridge)

CYNTHIA PROCTOR	)	
Claimant,	)	
vs.	)	SUMMARY FINAL JUDGMENT
PAUL KRAMER, M.D.,	)	
Respondent.	)	
	)	

THIS CAUSE having come before the Court on the Defendant's Motion for Summary Judgment and upon argument of counsel, and the Court being otherwise fully advised in the premises the Court herewith makes the following findings of fact:

1. That the Plaintiff's claim for mediation was filed on June 24, 1976, as a result of an alleged cause of action which occurred on January 24, 1975.

2. That on August 10, 1976, the Defendants filed a request for extension of time requesting the Court to enter an order

extending the time of the holding of the final hearing to the maximum allowable by the medical malpractice reform act.

3. That on November 15, 1976, an agreed order was entered stating that the final hearing in the mediation shall be conducted within ten months from the date of the filing of the law suit.

4. That there was no hearing held on the issue of the Defendant's actionable negligence within a hundred and twenty days of the date the Plaintiff's claim for mediation was filed.

5. That there was no order entered extending the time for the holding of the final hearing within a hundred and twenty days of the date the Plaintiff's claim for mediation was filed.

6. That there was no hearing scheduled on Defendant's request for extension of time within one hundred and twenty days of the date the Plaintiff's claim for mediation was filed.

IT IS FURTHER the finding of this Court that because one hundred and twenty days lapsed from the date the Plaintiff's claim for medical

mediation was filed without a hearing having been held and without an order having been entered extending the time for conducting the hearing that the jurisdiction of the medical mediation panel terminated on October 24, 1976.

IT IS FURTHER the finding of this Court that the order entered on November 15, 1976, extending the time is invalid because the jurisdiction of the mediation panel had previously terminated, and because it was not entered within the one hundred and twenty day period. This order is further held to be invalid and because said order is invalid on its face in that it purports to extend the time for the final hearing to ten months from the date of the filing of the lawsuit, when in fact Florida Statute 768.44(3) specifically states that said extension shall not exceed six months from the date the claim is filed.

WHEREFORE the Court herewith enters a Summary Final Judgment in favor of the Defendant, PAUL KRAMER, M.D., and against the Plaintiff, CYNTHIA PROCTOR, and said Plaintiff shall take nothing by this claim against said

Defendant, and said Defendant shall go hence without stay.

The Court further reserves jurisdiction for the taxation of costs, if applicable.

DONE AND ORDERED in Chambers at Broward County, Ft. Lauderdale, Florida this 16th day of May, 1979.

/s/ BARBARA BRIDGE
CIRCUIT COURT JUDGE

Copies furnished to:

Stephen T. Brown, Esq.
Gary Wilkins, Esquire

Cynthia PROCTOR, Appellant,

v.

Paul KRAMER, M.D., Appellee.

No. 79-1324

District Court of Appeal of Florida,
Fourth District.

May 7, 1980.

Rehearing Denied March 3, 1981.

Appeal from Circuit Court, Broward County; Barbara Bridge, Judge.

Gary L. Wilkins of Wotitzky, Wotitzky, Johnson, Mandell & Batsel, Punta Gorda, for appellant.

K. Scott Dwyer and John A. Thompson, Jr. of Preddy, Kutner & Hardy, P.A., Miami, for appellee.

PER CURIAM.

Affirmed.

LETTS, C. J., and HERSEY, J., concur.

MOORE, J., dissents with opinion.

MOORE, Judge, dissenting:

I respectfully dissent. In my opinion, we should follow the reasoning in Limond v. Llanio, 349 So.2d 214 (Fla. 3rd DCA 1977) and hold that the termination of the medical mediation panel's jurisdiction did not occur, until the

expiration of six months following the filing of the claim. By so holding, the common law complaint was filed within the applicable statute of limitations and the summary, final judgment in favor of the defendant was erroneous.

SUPREME COURT OF FLORIDA

WEDNESDAY, APRIL 8, 1981

CYNTHIA PROCTOR,	*	
	*	
Petitioner,	*	CASE NO. 60,450
	*	
vs.	*	District Court of
	*	Appeal, 4th District
PAUL KRAMER, M.D.,	*	- No. 79-1324
	*	
Respondent.	*	
	*	

* * * * * * * * * * * * *

It appearing to the Court that it is without jurisdiction, the Petition for Review is hereby dismissed. Jenkins v. State, 385 So.2d 1356 (Fla. 1980).

No Motion for Rehearing will be entertained by the Court.

A True Copy
TEST:

Sid J. White
Clerk, Supreme Court

By: /s/ Tanya Carroll
Deputy Clerk

cc: TC
Hon. Clyde Heath, Clerk
Hon. Barbara Bridge, Judge
Hon. Robert E. Lockwood, Clerk

Gary L. Wilkins, Esquire
K. Scott Dwyer, Esquire

CASE NO. 81-40

IN THE SUPREME COURT OF THE UNITED STATES
(October Term 1981)

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ALEXANDER L. STEVAS,
CLERK

CYNTHIA PROCTOR,

Petitioner,

vs.

PAUL KRAMER, M.D.,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Florida

---

BRIEF OF RESPONDENT

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Counsel for Respondent

BRIEF IN OPPOSITION TO ACCEPTANCE OF JURISDICTION

A. QUESTION PRESENTED FOR REVIEW

Pursuant to Rule 34.2, United States Supreme Court Rules, respondent respectfully submits that the Question Presented for Review set forth in the Petition for Certiorari is, in certain particulars, neither accurate nor satisfactory and requires response by respondent in order to correctly characterize the issue before this Court in these proceedings. Respondent does not take issue with the procedural chronology set forth by petitioner.

When the trial court having jurisdiction over the matter, the Circuit Court of the Seventeenth Judicial Circuit of Florida, in and for Broward County, rendered summary final judgment in favor of respondent and against petitioner, petitioner appealed to the District Court of Appeal of Florida, Fourth District, in accordance with the provisions of Article V, Section 4(b)(1), Florida Constitution, which provides in pertinent part as follows:

> "District courts of appeal shall have jurisdiction to hear appeals, that may be taken as a matter of right, from final judgments or orders of the trial courts. . . ."

In accordance with practice and procedure set forth in the Florida Appellate Rules, a party appealing a final judgment presents a written brief to the court, as does the appellee, has the opportunity to file a reply brief, and presents oral argument. The District Court of Appeal reviews the original record forwarded to it and renders its decision.

In this particular instance, the decision of the District Court of Appeal of Florida, Fourth District, was a per curiam affirmance without opinion. One judge dissented, stating that in his opinion, the Court should follow the reasoning of the decision of a sister District Court of Appeal which would result in reversal of the summary final judgment against petitioner.

The decision of the District Court of Appeal was issued on May 7, 1980. On June 26, 1980, while a petition for rehearing was pending (it was not denied until March 3, 1981), the

Supreme Court of Florida issued its opinion in Jenkins v. State, 385 So.2d 1356 (Fla. 1980). The Jenkins decision was one in a series of clarifying opinions necessitated by a recent amendment to Article V, Section 3(b)(3) of the Florida Constitution setting forth the discretionary jurisdiction of that court.

Prior to the effective date of the amendment, April 1, 1980, the applicable provision of the Florida Constitution gave to the Supreme Court of Florida discretionary jurisdiction to review any decision of a district court of appeal that was in direct conflict with the decision of any district court of appeal or the Supreme Court. Subsequent to amendment, the section provides that the Supreme Court of Florida may review any decision of a district court of appeal that expressly and directly conflicts with the decision of another district court of appeal or the Supreme Court.

The Jenkins decision addresses the question of whether the Supreme Court of Florida, under the amended constitutional provision, has jurisdiction to review a decision of a district court

of appeal which reads in its entirety "Per Curiam Affirmed" where a dissenting opinion is filed in the case. The Court answers that question in the negative.

Thus, petitioner's statement that while her case was "in the appellate process" she could have expected Supreme Court review in the event the Fourth District Court of Appeal ruled contrary to the Third District Court of Appeal is not accurate. The Jenkins decision, issued before the decision of the District Court of Appeal became final established the law of Florida henceforward to be that a "Per Curiam Affirmance" with dissent was not reviewable under the discretionary review provisions of the newly amended Constitution.

Petitioner incorrectly states that after her motion for rehearing was denied in the District Court of Appeal she filed "an appeal" to the Florida Supreme Court. No appeal as a matter of right would lie from the decision of the District Court of Appeal in the instant

case.[1] Petitioner's appeal as a matter of right was from the trial court to the District Court of Appeal. Thereafter, in order to seek review petitioner had to, and did, seek to have the Supreme Court of Florida exercise its discretionary jurisdiction to review the decision of the District Court of Appeal. Petitioner's repeated reference to the proceedings filed in the Supreme Court of Florida as an "appeal" are incorrect and misleading.

Petitioner characterizes the refusal by the Supreme Court of Florida to exercise its discretionary jurisdiction to review a "Per Curiam Affirmance" without opinion as arbitrary and capricious and a denial of due process and equal protection of the law. The real Question Presented for Review is whether the Supreme Court of Florida, following the pattern set by the Supreme Court of the United States, may properly refuse to exercise its discretionary jurisdiction to review the decision of a lower appellate

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[1]Article V, Section 3(b)(1) and 3(b)(2), Florida Constitution.

court, particularly where the State constitution, as interpreted by the Supreme Court of the state, does not provide for such discretionary review.

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Art. V, § 3(b)(2)	5, 11
Art. V, § 3(b)(3)	3

D. JURISDICTIONAL GROUNDS

Respondent submits that the judgment sought to be reviewed is not, as stated by petitioner, dismissal by the Florida Supreme Court of petitioner's appeal by order dated April 8, 1981. The order of the Supreme Court is a dismissal of the proceedings filed by petitioner by notice to invoke the discretionary (certiorari) jurisdiction of the court based on an asserted conflict of decisions between district courts of appeal on the question of termination of jurisdiction of medical mediation panels.

Jurisdiction of this Court is challenged on the basis that the decision here sought to be reviewed is not a "final judgment" rendered by the highest court of a state in which a decision could be had where a right is claimed under the United States Constitution pursuant to 28 U.S.C. § 1257(3). The order of the Supreme Court of Florida refusing to exercise its discretionary jurisdiction is not a final judgment cognizable under the laws of the United States for review in this Court.

E. CONSTITUTIONAL PROVISIONS

Constitution of the State of Florida, Article V

"§ 3 Supreme court

* * *

(b) Jurisdiction.--The supreme court:

(1) Shall hear appeals from final judgments of trial courts imposing the death penalty and from decisions of district courts of appeal declaring invalid a state statute or a provision of the state constitution.

(2) When provided by general law, shall hear appeals from final judgments entered in proceedings for the validation of bonds or certificates of indebtedness and shall review action of statewide agencies relating to rates or service of utilities providing electric, gas, or telepone service."

F. STATEMENT OF THE CASE

Petitioner's Statement of the Case is correct except in stating that petitioner "appealed to the Florida Supreme Court". As previously pointed out, petitioner's appeal was to the District Court of Appeal of Florida, Fourth District. This appeal resulted in the "Per Curiam Affirmance" without majority opinion. This determination of the District Court of Appeal was sought to be reviewed in the Supreme Court of Florida by way of invoking the discretionary jurisdiction of that court. The petition for review was dismissed by the order which is the subject of the instant proceedings.

G. SUMMARY OF ARGUMENT

The Constitution of the State of Florida guarantees to petitioner the right to appeal from an adverse determination rendered by a trial court. Petitioner exercised her constitutional right by appealing to the designated district court of appeal. That court decided against petitioner on the merits of her claim, but chose not to write an opinion explaining its reason. There was a dissent.

Petitioner thereafter sought to have the Supreme Court of Florida exercise its discretionary jurisdiction to review the decision of the district court of appeal. The Supreme Court of Florida, having previously determined that it did not have jurisdiction to review a decision of a district court of appeal which reads in its entirety "Per Curiam Affirmed" where a dissenting opinion is filed, dismissed the application for review filed by petitioner. In doing so, it neither denied to petitioner due process nor equal protection of the law.

This Court has refused to review orders of the highest court of a state which merely de-

cline to exercise discretionary review where the order does not reflect a determination on the merits. Furthermore, an order declining to accept discretionary jurisdiction is not a final judgment rendered by the highest court of a state in which a decision could be had subject to review by this Court because a right is claimed under the Constitution of the United States.

H. ARGUMENT

Petitioner seeks to have this Court exercise its discretion to review an order of the Supreme Court of Florida declining to exercise its discretion and dismissing the application for review previously filed in that court. Petitioner claims such dismissal is a denial of her right to due process and equal protection guaranteed by the United States Constitution. Petitioner's claim is without merit.

It is and has been the basic policy of this Court that its only power over a state judgment is to correct it to the extent that it incorrectly adjudges federal rights. Herb v. Pitcairn, 324 U.S. 117, 65 S.Ct. 828, 89 L.Ed. 79 (1945). This supervisory authority over state court decisions has been succinctly described:

> "We do not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement." Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 2013, 32 L.Ed.2d 530 (1972).

Here, the Supreme Court of Florida exer-

cised its constitutional prerogative to determine the extent of its discretionary jurisdiction under the appropriate provision of the Florida Constitution. That document, recently amended by the electorate of the State of Florida, provides that the Supreme Court may review a decision of a district court of appeal that expressly and directly conflicts with the decision of another district court of appeal or the Supreme Court on the same question of law.

Shortly after the 1980 amendment to the Constitution, the Supreme Court issued an explanatory decision in Jenkins v. State, 385 So.2d 1356 (Fla. 1980). It addressed the question of whether that court had jurisdiction to review a decision of a district court of appeal which reads in its entirety "Per Curiam Affirmed" where a dissenting opinion is filed in the case. In Jenkins, discretionary review was sought under the new constitutional provision, asserting that such a decision of the district court of appeal was in conflict with the decisions of other districts or of the Supreme Court on a question involving uncorroborated hearsay infor-

mation from a confidential informant.

In answering the question as to its jurisdiction, the Supreme Court carefully analyzes the dramatic change made to the Florida Constitution by the latest amendment to that section which sets forth the area of discretionary review by the Supreme Court of Florida. Prior to the April 1, 1980 amendment, the provisions of the applicable section of the Florida Constitution relating to review of conflicting decisions read that the Supreme Court may review by certiorari any decision of a district court of appeal that is in direct conflict with a decision of any district court of appeal or of the Supreme Court on the same question of law.

Subsequent to the April 1, 1980 amendment, that section reads the Supreme Court of Florida may review any decision of a district court of appeal that expressly and directly conflicts with the decision of another district court of appeal or of the Supreme Court on the same question of law.

Viewing the constitutional amendment in light of the historical development of decisional

law, the court's analysis begins with the seminal amendment to the judicial article of the Florida Constitution which occurred in 1956 creating the district courts of appeal. The Jenkins decision quotes from the earlier decision of the Supreme Court of Florida in Ansin v. Thurston, 101 So.2d 808 (Fla. 1958), in which the court speaking shortly after the constitutional creation of the district courts of appeal points out that under the constitutional plan the powers of the Supreme Court to review decisions of district courts of appeal are limited and strictly prescribed. It was never intended that such courts be intermediate appellate courts. The new role of the Supreme Court of Florida after the 1956 amendment was as a supervisory body in the state judicial system, exercising power to preserve uniformity of principle and practice in the state.

Thereafter, the Jenkins decision reviews the decisional law in effect prior to the April 1, 1980 amendment to the jurisdictional provision, including a determination by the Supreme Court of Florida that under the former constitu-

tional provision conflict certiorari jurisdiction could be founded on a dissenting opinion to a per curiam majority decision rendered without opinion. See, Huguley v. Hall, 157 So.2d 417 (Fla. 1963).

Ten years after Huguley, the Supreme Court of Florida decided Commerce National Bank in Lakeworth v. Safeco Insurance Co., 284 So.2d 205 (Fla. 1973). While tentatively accepting jurisdiction (and subsequently discharging the writ for lack of conflict), the court observes that facts and testimony set forth in a dissent do not rise to a similar level of dignity as those set forth in a majority opinion and are not considered precedent.[2] The Jenkins decision goes on to list other decisions of the Florida Supreme Court which questioned the wisdom of the jurisdictional policy expressed in Huguley:

> "It was against this jurisprudential backdrop and in the face of a staggering case load that in November, 1979, this Court

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[2]The instant dissent of the District Court of Appeal contains no facts and is merely the dissenter's "opinion" that the "reasoning" of a sister court should be followed.

> urged the legislature, meeting in special session, to enact a proposed amendment to section 3 of article V of the Florida Constitution to limit the jurisdiction of the Supreme Court." Jenkins v. State, supra, at pages 1358-1359.

The legislature responded to the request of the court by enacting a joint resolution which forms the language of the current jurisdictional provision in the Florida Constitution. At hearings before the legislature and in meetings held throughout the state, members of the Supreme Court represented that one intent of the revision of the jurisdictional article was to eliminate the jurisdiction of the Supreme Court to review for conflict purposes per curiam decisions of district courts of appeal with concurring or dissenting opinion:

> "There can be little doubt that the electorate was informed as to this matter, because opponents of the amendment broadcast from one end of this state to the other that access to the Supreme Court was being 'cut off,' and that the district courts of appeal would be the only final courts of appeal in this state. With regard to review by conflict certiorari of per curiam decisions rendered without

opinion, they were absolutely correct." Jenkins v. State, supra, at page 1359.

The Supreme Court of Florida then went on to enunciate its precise holding:

> "The pertinent language of section 3(b)(3), as amended April 1, 1980, leaves no room for doubt. This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the term 'express' include: 'to represent in words'; 'to give expression to.' 'Expressly' is defined: 'in an express manner.' Webster's Third New International Dictionary, (1961 ed. unabr.). The single word 'affirmed' comports with none of these definitions. Furthermore, the language and expressions found in a dissenting or concurring opinion cannot support jurisdiction under section 3(b)(3) because they are not the decision of the district court of appeal. As stated by Justice Atkins in Gibson v. Maloney, 231 So.2d 823, 824 (Fla. 1970), '[i]t is conflict of decisions, not conflict of opinions or reasons that supplies jurisdiction for review by certiorari.' (Emphasis in original.)" Jenkins v. State, supra, at page 1359.

Accordingly, it was determined that from

and after April 1, 1980, the Supreme Court of Florida lacked jurisdiction to review per curiam decisions of a district court of appeal rendered without opinion, regardless of whether they were accompanied by a dissenting or concurring opinion when the basis for review was an alleged conflict of that decision with the decision of another district court of appeal or of the Supreme Court.

The petition for review filed by petitioner herein in the Supreme Court of Florida was accompanied by the district court of appeal decision. The Clerk of the Supreme Court, in accordance with its internal operating procedures, dismissed the petition for review, citing the Jenkins decision.[3]

The question presented here is whether this Court shall exercise its discretion to grant

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[3]Petitioner also complains here about the summary nature of the dismissal by the clerk without review by the court. Once the court had announced its policy that it had no discretionary jurisdiction to accept such decisions, it would have been a waste of judicial time and effort to require the members of the court to review petitions and supporting briefs before authorizing dismissal.

review of the determination by the Supreme Court of Florida refusing to grant discretionary review because of a lack of jurisdiction under the applicable constitutional provision. Many of the same considerations governing whether this Court will grant discretionary review were involved when the Supreme Court of Florida determined that it would not exercise its discretionary power of review.

Under Rule 17, United States Supreme Court Rules, review by writ of certiorari is not a matter of right, but of judicial discretion, being granted only where there are special and important reasons therefor. The dismissal of the petition for discretionary review by the Supreme Court of Florida satisfies no criteria entitling petitioner to further review by this Court.

Respondent certainly does not dispute the general principle stated by petitioner that the guarantees of due process and equal protection contained in the federal constitution intend that all persons should have access to the courts of this country. Petitioner, however, incorrectly relates what occurred in the Supreme Court of

Florida to an impermissible denial of the right to appeal and thus an impermissible denial of access to the courts of the State of Florida.

Petitioner fails to point out that the Constitution of the State of Florida provides an appeal as a matter of right to all litigants. Petitioner exercised this constitutional right by appealing to the District Court of Appeal of Florida, Fourth District. What petitioner is actually complaining about is the failure of the District Court of Appeal to write an opinion which expressly and directly conflicted with the decision of another district court of appeal so that discretionary review might be sought and might be granted by the Supreme Court of Florida. No authority is cited for the proposition, and research discloses none, which finds a denial of due process or equal protection for the absence of a written opinion explaining the decision of a court.[4]

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[4]If petitioner is actually aggrieved by the failure of the District Court of Appeal to write an opinion, the writ of certiorari presently addressed to the state supreme court should properly have been addressed to the District Court

In a landmark case, the Supreme Court of Florida requested a District Court of Appeal to write an opinion to accompany its decision. The District Court of Appeal correctly responded that its constitutional duty was to render decisions, not to produce theories and reasons for the decisions. Foley v. Weaver Drugs, Inc., 172 So.2d 907 (Fla. 3d DCA 1965). Even had the District Court of Appeal in the instant case written an opinion to accompany its decision affirming the trial court, acceptance of jurisdiction by the Supreme Court was still discretionary.

It is interesting to note that Florida's Ansin decision discussing the function of the state supreme court under the constitutional provisions creating the district courts of appeal quotes from the decision of this Court in Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 48 S.Ct. 422, 67 L.Ed. 712 (1923). This Court

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4 (Cont'd.) of Appeal, even though the state judicial system provided discretionary review by the supreme court. See, American Railway Express Co. v. Levee, 263 U.S. 19, 44 S.Ct. 11, 68 L.Ed. 140 (1923).

emphasized the obvious importance of developing consistent rules for limiting issuance of writs of certiorari to cases involving settlement of principles of importance to the public as distinguished from that of the parties and only in those cases where there is a real and embarrassing conflict of opinion and authority. The "decision" of the Supreme Court of Florida in the instant case does not settle an important principle nor does it involve a real or embarrassing conflict of opinion and authority.

Quite the contrary, it embodies the consistent position of this Court that the discretionary jurisdiction of a court can be utilized to keep its business to manageable proportions. See, Brown v. Allen, 344 U.S. 443, 73 S.Ct. 437, 97 L.Ed. 469 (1953).

The Supreme Court of Florida determined that a per curiam decision rendered without opinion creates no real or embarrassing conflict of opinions within the state court system. Accordingly, it has refused to exercise its discretionary jurisdiction to review petitioner's case. Not only is there no special nor impor-

tant reason for this Court to review such a determination (which accords with this Court's own views of its discretionary jurisdiction), but it is equally clear that in the denial of review by the Supreme Court of Florida there has been no decision on a federal question nor deprivation of a constitutionally guaranteed right.

Denial of review by this Court in the instant case would, furthermore, be in accord with long-standing policy not to review determinations of state courts of last resort refusing to accept jurisdiction without resolving the merits of the case before it. See, Norfolk & Suburban Turnpike Co. v. Commonwealth of Virginia, 225 U.S. 264, 32 S.Ct. 828, 56 L.Ed. 1082 (1912).

I. CONCLUSION

For the reasons and under the authorities set forth above, it is respectfully submitted that petitioner has shown no special nor important reason why this Court should exercise its discretion and grant review by writ of certiorari in the instant case. Just as review on writ of certiorari is not a matter of right under federal law, it is not under the Florida Constitution.

The Supreme Court of Florida determined that it did not have constitutional jurisdiction to review an affirmance by a district court of appeal without written opinion consequent upon an appeal as a matter of right taken by petitioner. As such, it determined that in the abscence of decisional conflict it was without power to review petitioner's case even if a majority of the court desired to do so. All litigants similarly situated are treated equally.

Petitioner had her constitutionally guaranteed day in the appellate courts of the State of Florida. No federally guaranteed constitutional right was denied by failure of the Supreme

Court of Florida to exercise its discretionary review. The petitioner for writ of certiorari previously filed in this Court should be dismissed.

Respectfully submitted,

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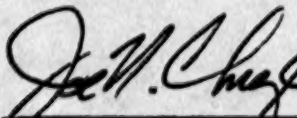
BY: 
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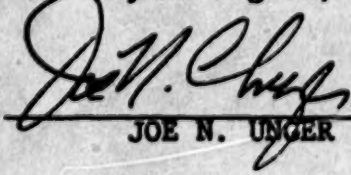
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent has been served upon Gary L. Wilkins, Esquire, Wotitzky, Wotitzky, Mandell, Batsel & Wilkins, 590 Harbor Boulevard, Suite 204, Port Charlotte, Florida 33952, by depositing in a United States post office or mailbox, with first-class postage prepaid, this 5th day of August, 1981.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Office-Supreme Court, U.S.
FILED
AUG 28 1981
ALEXANDER L. STEVAS,
CLERK

CASE NO. 81-40

IN THE SUPREME COURT OF THE UNITED STATES
(October Term 1981)

CYNTHIA PROCTOR,

Petitioner,

vs.

PAUL KRAMER, M.D.,

Respondent.

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WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

REPLY BRIEF

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REPLY BRIEF OF PETITIONER

A. QUESTIONS PRESENTED FOR REVIEW.

Notwithstanding Respondent's statement to the contrary, the issue presented for review is simply whether an appellate scheme which precludes the resolution of conflicts emanating from different appellate courts within the same state, thus subjecting citizens within that state to differing interpretations of the same state law, denies equal protection and due process of law.

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D. JURISDICTIONAL GROUNDS:

The Respondent stated, without reference to any authority, that this Court does not have jurisdiction to consider the instant case because the decision sought to be reviewed was not a "final judgment" rendered by the highest court of the state in which a decision could be had. However, as succinctly stated in Gallick v. Baltimore & Ohio Railroad Company, 372 U.S. 108, 9 L. Ed. 2d 618, 83 S. Ct. 658 (1963), this Court does have jurisdiction to review this case since it does represent the final judgment of the State Courts.

In Gallick the Court of Appeals of Ohio reversed the verdict of a trial court and the Ohio Supreme Court refused further appellate review. This Court held that this refusal made the intermediate appellate court's decision the final judgment rendered by the state court so as to allow review of that case. Similarly, the refusal of the Florida Supreme Court in the instant case to grant further appellate review rendered the intermediate court's decision the

final judgment of a State Court; therefore, review is allowable by this Court.

E. ARGUMENT:

The Respondent has confused and misstated the nature and extent of the Florida Supreme Court's discretionary jurisdiction under Article V, Section 3(b)(3) of the Florida Constitution as interpreted in Jenkins v. State, 385 So. 2d 1356 (Fla. 1980). What the Respondent referred to as an exercise of discretionary jurisdiction is actually an arbitrary refusal to take jurisdiction. Discretion arises only in the event the district court of appeal sees fit to write an opinion.

The Florida Supreme Court in Ansin v. Thurston, 101 So. 2d 808 (Fla. 1958), as the respondent correctly cites, set forth the policy of the Florida Supreme Court as that of preserving the uniformity of principle and practice in the State. To accomplish this purpose the scope of Florida Supreme Court review must not be limited in the manner implicit in the Jenkins interpretation of the Constitution.

The effect of such an interpretation is directly counter to the policy of having uniform law throughout the State. The real effect promotes different laws in the various districts of the State. The following example of the impact of the Jenkins interpretation of the Florida Constitution illustrates this effect.

In 1973 the Florida Supreme Court judicially adopted the doctrine of comparative negligence in Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973). Suppose a trial court reinstituted the doctrine of contributory negligence and on appeal the district court entered a per curiam opinion without a written majority opinion but with a dissenting opinion clearly pointing out the conflict with Hoffman. Under Jenkins the Florida Supreme Court would be unable to consider this decision. The effect of such a situation would be that in one district of the same state trial courts would follow the doctrine of contributory negligence while in all others comparative negligence would be the rule.

The instant case reflects an identical occurrence which, no doubt, happens frequently. As is apparent from the case sub judice and the Hoffman example, a real and embarassing conflict of opinions is inherent in the Jenkins interpretation of Article V, Section 3(b)(3) of the Florida Constitution. Also, counter to the Respondent's argument that there are no special or important reasons for this Court to grant review, the above example illustrates the widespread inequity and injustice that surely result from the Florida Supreme Court's decision in Jenkins. Such capricious results constitute special and important reasons for granting jurisdiction in this cause.

During the past few months the Florida Supreme Court has itself recognized the injustice inherent in the Jenkins interpretation of Article V, Section 3(b)(3) of the Florida Constitution. In Jollie v. State of Florida, 6 FLW 555, (Fla. 1981), the Florida Supreme Court partially receded from Jenkins, holding that,

> "a district court of appeal per curiam opinion which cites as controlling authority a decision that is either pending review in or has been reversed by this Court continues to constitute prima facie express conflict and allows this Court to exercise its jurisdiction."

The Court admitted in Jollie that inequities were inherent in the interpretation of Article V, Section 3(b)(3).

> "We have no doubt that district court judges can produce one or more methodologies to preserve the review strictures of the 1980 amendment on the one hand, while on the other eliminating the possible injustice inherent in foreclosing review to some of several equally situated litigants." Id. at 556.

In fact, there is no methodology of which petitioner is aware that will eliminate the injustice which exists when some litigants are allowed review while others are not, merely because a district court chooses to write a majority opinion for one but not for another. Allowing the several district courts absolutely to preclude review by the Florida Supreme Court is fundamentally unsound. The only solution is the elimination of the prerequisite of a written

majority opinion for review, or, at the least, to allow review where a conflict is noted and made apparent in a dissenting opinion, as in the instant case. Thereby, all litigants facing conflicting district court decisions will, at least, have an equal opportunity to have the conflict resolved. Additionally, the Florida Supreme Court would not be in the position of fostering disparate rules of law in different districts of Florida.

For these reasons this Court should take jurisdiction and grant a Writ of Certiorari to the Florida Supreme Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief of Petitioner has been furnished, by United States Mail, to JOE N. UNGER, ESQUIRE, of the Law Offices of Joe N. Unger, P.A., 606 Concord Building, 66 West Flagler Street, Miami, Florida 33130; K. SCOTT DWYER, ESQUIRE, of Preddy, Kutner & Hardy, P.A., 12th Floor, Concord Building, 16 West Flagler Street, Miami, Florida 33130; and JIM SMITH, ESQUIRE, Attorney General of Florida, The Capitol, Tallahassee, Florida 32301, this 25th day of August, 1981.

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